No. 01-18-00237-CV

IN THE FIRST COURT OF APPEALS

FOR THE STATE OF TEXAS

KATHLEEN POWELL & PAUL LUCCIA

V.

CITY OF HOUSTON, TEXAS

On Appeal from Harris County Civil Court at Law No. 1, Harris County, Texas

APPELLANT'S REPLY BRIEF

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Oral Argument Requested

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STATEMENT REGARDING ORAL ARGUMENT[1]

This case if one of first impression, profound policy impact, and reflects broadly on the law of the State of Texas. Oral Argument is necessary to resolve this important case.

The City of Houston is the only large city in the U.S. that has a City Charter provision against zoning. The Appellants' argument is that by creating land-use districts on the map, the City's Historic Preservation Ordinance actually creates zoning. This is an issue of first impression, which requires oral argument at this Court. The City's law violates the Zoning Enabling Act of the State of Texas, and the will of the people of Houston, who have voted to prohibit this type of land-use regulation in the City Charter. For these reasons, oral argument is necessary.

[1] Appellants object to the City's ad hominem characterization of their "counsel's" legal argument. *See* City's Brief at ix. Appellants filed this case in 2012 and have presented the legal arguments in this appeal since then, six years before retaining present pro-bono counsel. Appellants are private parties entitled to the respect of the City and the consideration of this Court.

RESTATEMENT OF ISSUES PRESENTED[2]

1. Do the City's ordinance and regulations for geographic historic district and land use controls constitute zoning?

2. Do the City's historic district zoning laws violate the Houston City Charter?

3. Do the City's historic district zoning laws violate the Texas Legislature's Zoning Enabling Act?

RESTATEMENT OF FACTS

The parties agreed at trial that there are no factual issues in dispute, and that this case is purely an interpretation of law. It is important to note however, that the Trial Court made no Findings of Fact. This brief Restatement only seeks to clarify three inferences from the City's Counter-Statement of Facts. First, there was never a mandatory historic *district* law until 2010. The original 1995 Ordinance was not mandatory, and by its own admission the 2005 amendments only applied to historic *buildings*, not *districts*. *See* Appelle's Brief at 2. The elimination of the 90-day waiver—making the districting rules mandatory—did not happen until 2010.

Second, the Appellee's characterization of the reconsideration request inaccurately implies that only 24% of the homeowners voted to repeal. In fact, the

[2] The Appellants re-state here the three issues that are dispositive of this case. The City argues against the Appellants' three issues, namely (1) whether the Historic Preservation Ordinance constitutes zoning; (2) whether the districting Ordinance constitutes de facto zoning under the Texas Local Government Code; and (3) whether the districting Ordinance violates the City Charter prohibition against zoning. If the Ordinance constitutes zoning, then this case turns on the second and third issues, namely, that because the HPO is a zoning ordinance, it violates both State and City law.

Appellants have maintained that the reconsideration note was a majority against the historic district, but the Planning Commission nevertheless determined not to rescind the district. This fact is not relevant to the current dispute over whether the districting law constitutes zoning, but the City's characterization implies that it was a Finding of Fact at trial.

Third, the City states facts regarding the percentage of Houston that is subject to historic district zoning, which are not relevant to this case. *See* Appellee's Brief at 4. Historic districts are a zoning "overlay" and by definition do not apply to the entire geography of a city. The only facts relevant to the dispositive issue in this case are the land-use restrictions that apply to the geographic historic districts themselves.

SUMMARY OF ARGUMENT

The City's brief makes three major errors that obfuscate the correct outcome of this case. First, the City throughout its entire brief confuses the related but distinguished concepts of the regulation of individual ***buildings*** (which are subject to normal police-power regulations, and the regulation of geographic ***districts*** (which constitute "zoning" under the City Charter the Texas Local Government Code). Second, the zoning power was not delegated from the State of Texas under general home rule powers, but was ***specifically delegated under the Zoning***

Enabling Act, and that power is subject to the Act's substantive and procedural requirements. Third, the City's argument implies that home-rule powers are so broad that they are not subject to the rules of the Texas Constitution, the Texas Statutes, or the City Charter of Houston. Houston is the ***only major City in the U.S. with an explicit voter-approved Charter amendment prohibiting zoning***. The City's interpretation would read these rules out of existence, and is contrary to the common-sense and well-established conception of zoning as the drawing of geographic districts on the map subject to differing land-use rules based on location in the City.

ARGUMENT AND AUTHORITY

I. Zoning is a Government Act that Draws Districts on the Map with Different Land Use Rules

Zoning, as set forth in the Appellants' Brief, is the drawing of districts within a local government that prescribes different land use rules based on geographic location. *See* Appellants' Brief at 12. This is the common-sense and well-accepted definition of zoning, dating back over 100 years in American land use law. When a local government draws districts on the map, it is the well-understood essence of zoning. *See* BLACK'S LAW DICTIONARY 1618 (6th ed. 1990).

The City's argument relies entirely on its misperception of the difference between historic preservation in ***buildings*** (i.e., "landmark laws," implicating only

individual buildings) and historic ***districts***, which were designed in the early-to-mid-Twentieth Century explicitly under local governments' established ***zoning*** power, which had been specifically delegated by state legislatures' Zoning Enabling Acts (including Texas Local Government Code Chapter 211, enacted in 1927—well after the general home rule amendment to the Texas Constitution).

The City's brief makes great hay out of the Appellants' recognition that—of course—a local government has substantial power under its home-rule authority, including the regulation of certain land-use aspects. The Appellants have been straightforward in acknowledging that the City has home-rule power, delegated by the State in 1909. *See* TEXAS CONSTITUTION, art. XI, sec. 5. But the entirety of the City's brief mistakenly conflates the two distinct concepts of historic buildings and historic districts, which in turn mischaracterizes the fundamental legal difference between home-rule land regulation of, e.g., building and safety standards, and even historic landmarks, with the fundamentally different legal aspects of zoning by district, which was *subsequently* delegated in 1927, and is defined and regulated by the Local Government Code, and specifically prohibited by the Houston City Charter. *See* TEXAS LOC. GOV'T CODE ch. 211; HOUSTON CITY CHARTER art. VII-b. The City's mischaracterization confuses the issue in this case, which is really about one thing only: whether the historic ***districting*** rules constitute zoning by geographic district.

As set forth extensively in the Appellants' brief, the development of historic district laws preservation comes directly out of the delegated zoning power, and not general home rule, starting in places like Charleston and New Orleans in the decades after those cities were delegated the zoning power through their respective State Enabling Acts. *See* Appellants' Brief 17-20. The Appellants will not recite that history again here, except to note that the City's characterization ignores the statutory origin and legal authority of historic district laws. Historic district zoning arose under the specifically-delegated zoning power, only after zoning by district was established as constitutional under *Euclid* and state court cases (including *Spann* and *Lombardo* in Texas)—well after home rule delegation—and courts recognized municipalities' zoning power under their *enabling statutes* (i.e. the Texas Local Government Code ch. 211), and *not* under general home rule powers.

As a leading property law treatise puts it, zoning law is distinguished from general home-rule powers in its source of authority: "[T]his general grant [of home-rule authority] has been held *not to cover the power to zone land; rather a specific zoning enabling act, such as the Standard Zoning Enabling Act (SZEA) is required*." *See* WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY 584 (3d ed. 2000) (emphasis supplied). In Texas, that specific Zoning Enabling Act is the 1927 enactment of the law now codified as Local Government

Code Section 211. In other words, a municipality can only engage in districting under a *zoning* law, and not under general home-rule powers.

Even the City's own cited casebook notes specifically that the legality of historic districting comes specifically from zoning enabling law, and not from general home-rule power. "Historic preservation, as we have seen, grew to prominence from grass roots movements in the 1960s and 1970s . . . entirely ***legal under existing zoning laws***." *See* SARA C. BRONIN & J. PETER BYRNE, HISTORIC PRESERVATION LAW 335 (2012) (emphasis supplied). While many municipalities have codified historic preservation in separate chapters of their city codes, the entire legal basis for historic districts has always been *zoning* enabling laws, not general home-rule powers. That is because "zoning" is the power to regulate property not in general, but specifically by *district*.

There is no better visual depiction of how the historic preservation ordinance creates zoning than the City's own Exhibit "A." *See* Appellee's Brief, Exh. A. While the City promotes this map for the incorrect assumption that a districting law is only zoning if the *entire city* is zoned, it misunderstands that by definition, historic districts are a zoning *overlay*, meaning that they are an addition to (what in most cities would be) the general zoning map.[3] Furthermore, under the terms of the

[3] By both legal definition and common sense, a historic district law can only cover a certain part of any municipality—i.e., the historic parts. That is why it is necessarily an "overlay" and not a full-city district map; but regardless, it is still understood as an act of zoning.

Ordinance, there is nothing to stop the further proliferation of these districts, which means that the City's arguments on percentages are not relevant. The City's map actually makes strikingly clear that the historic district ordinance absolutely has the effect of drawing lines on the map, creating districts, and that these districts prescribe different land-use regulations based on whether a property owner is within or outside the district. This is the essence of zoning by any definition.

II. The State of Texas Defines and Delegates Zoning Power to Municipal Corporations in the Texas Zoning Enabling Act

This case turns on the fact that the City's drawing of historic districts constitutes zoning under the Texas Statutes, the Houston City Charter, and generally-accepted common legal understanding. This Part will address the specifics of the Texas Local Government Code and the Charter. As noted above, the City's primary mistake is in conflating general "land-use regulations" and historic "building" rules with historic ***districts***, which are only allowed under the substantive and procedural rules of the state Zoning Enabling Act (i.e., ch. 211), and which violate the Charter.

The most important point for the Court is that the 1927 law now codified as Chapter 211 of the Texas Local Government Code is an ***Enabling Act***, meaning it is a specific delegation of State sovereignty to any municipal corporation that chooses to use that power (which the voters of Houston have expressly declined).

Local governments have only those powers delegated by the sovereign State governments, and although home-rule powers are generally broad, they do not override other statutes that delegate specific powers (especially when those other statutes, such as Chapter 211, are enacted later in time). In other words, the power to zone by district comes *only* from the specific laws in Chapter 211, enacted in 1927 after much debate over zoning power, and *not* from the more general home-rule powers delegated in 1909. The City's logic—that cities can do whatever they want under home rule, despite more specific statutes that prescribe rules to the contrary—would render Chapter 211 a nullity.

The Appellants' Brief sets forth in detail the legal history of zoning in Texas and Houston. *See* Appellants' Brief 13-15. Without retelling all of the details, the timeline (regarding the City's argument) is basically as follows: (1) The State of Texas delegated home-rule powers through the current Amendment XI, sec. 5 in 1909. *See* TEXAS CONST., amend. XI, sec. 5.[4] (2) In 1921, the Texas Supreme Court ruled that a zoning ordinance was beyond the scope of home-rule powers under the Texas Constitution. *See Spann v. City of Dallas*, 235 S.W. 513, 518 (Tex. 1921). (3) In 1922, the U.S. Commerce Department promulgated the Standard State Zoning Enabling Act, defining zoning as the regulation of "height, number of

[4] As discussed further below, the home-rule amendment also contains a key restriction, namely that a home-rule municipality cannot exercise this power in a way that conflicts with general State law.

stories, and size of buildings[s] . . . percentage of lot that may be occupied, the size of yards . . . the density of population, and the location and use of buildings . . . ." *See* II R.R. at Ex. 28. (4) In 1926, the U.S. Supreme Court ruled the concept of zoning to be not an unconstitutional taking under the federal Fifth Amendment. *See Village of Euclid v. Ambler Realty, Inc.*, 272 U.S. 365 (1926). (5) In 1927, the Texas Legislature enacted the state Zoning Enabling Act, modeled off the SSZEA, now codified as Chapter 211 of the Texas Local Government Code. (6) In 1934, the Texas Supreme Court ruled that the Texas Zoning Enabling Act is constitutional. *See Lombardo v. City of Dallas,* 73 S.W.2d 475 (Tex. 1934).

What is clear from this history is that the City is mistaken in characterizing drawing land-use *districts* as "just-another home-rule act"—districting is clearly a separate power that was not delegated with the prior, general home-rule amendment, but only made available after the subsequent, and more specific, Zoning Enabling Act.

At no time of the history of this case have Appellants ever argued that Texas cities can't use the delegated power of zoning. That would be absurd, because the Legislature has clearly delegated that power—*if* cities choose to use it.[5] But this case turns entirely on the fact that the Legislature has clearly defined the substance and procedure required for using that power. The Texas Zoning Enabling Act—

[5] As, of course, the voters of Houston have quite clearly rejected. *See* CITY CHARTER art. VII-b.

like the federal SSZEA, which established the basic definition of zoning—characterizes zoning as regulation by district of height, bulk, density, size, location, and use. The very first section of the law states that the "Purpose" of the Zoning Enabling Act specifies that "The powers ***granted*** under this subchapter are for the purpose of promoting the publich health, safety, morals, or general welfare ***and protecting and preserving places and areas of historical, cultural, or architectural importance and significance***." TEX. LOCAL GOV'T CODE § 211.001 (emphasis supplied). Even in the very purpose of the specific delegation of zoning powers, the Legislature defined historic preservation as a zoning act.

The Legislature continues to clearly define what types of regulations constitute zoning. Section 211.003(a) defines zoning as districting regulations of (1) height and size; (2) percentage of lot occupied; (3) size of yards; (4) density; (5) location and use of buildings. TEX. LOCAL GOV'T CODE § 211.003(a). Significantly, this definition (and every other generally-accepted definition) of zoning includes many other types of land-use regulations besides strict categorization of "use," as the City consistently, and mistakenly, states. The essence of zoning, as defined by law, is not "use," but *districting*.

The very next subsection of the Zoning Enabling Act once again includes historic preservation districts as part of the definition of zoning, and therefore within the specific realm of Chapter 211 rather than general home-rule power: "(b)

In the case of designated ***places and areas*** of ***historical*** cultural, or architectural importance and significance, the governing body of a municipality may regulation the construction, reconstruction, alteration, or razing of buildings and other structures." TEX. LOCAL GOV'T CODE § 211.003(b) (emphasis supplied). This is not a regulation of "landmarks"—nothing could be clearer than that historic *districts* are part of the Texas Zoning Enabling Act. As such, they are governed by this specific enabling statute. If the City wants to regulate land by district, it must do so through its delegated zoning power.

There is no case on point that states that a historic preservation district is not zoning. The City cites several cases where Texas Courts have reached a conclusion that certain local government laws do not meet the definition of "zoning" under Chapter 211. Each of these cases is different from the issue at hand. In *Comeau*, the regulation at issue was for the location of mobile homes, and the City admits that the Court was not asked to decide whether the ordinances constituted zoning. *See* Appellee's Brief at 9. Significantly, these ordinances were much less restrictive than the comprehensive regulations at issue here. *City of Brookside Village v. Comeau*, 633 S.W.2d 790, 792 (Tex. 1982).

Likewise, in *Johnny Frank's Auto Parts*, the issue was about location of a specific type of use—in this case, the location of an automobile wrecking yard relative to other uses in the city. *City of Houston v. Johnny Frank's Auto Parts*,

480 S.W.2d 774 (Tex. Civ. App—Houston (14th Dist.) 1972). The Court held that the law did not rise to the level of zoning. The present case is entirely different because it draws actual districts on the map, with much more extensive regulations applied within those districts.

There are so few cases on this issue primarily because in a city that allows zoning—that is, nearly every city in America besides Houston—it is almost never an issue. The only other relevant case is *N.W. Enterprises*, where the Fifth Circuit rejected the theory of sexually-oriented business owners that a nuisance regulation requiring physical distance between those businesses and protected uses (such as schools and religious institutions) was zoning. *N.W. Enters, Inc. v. City of Houston*, 372 F.3d 333 (5th Cir. 2004). In that case, there were no districts drawn at all, just rules prescribing minimum distances, so it could not be "zoning" the way that this Ordinance creates actual, discrete districts on the map with different regulations.

The City has repeatedly confused the difference between "general land-use regulation" or historic "buildings" with historic "districts" and the zoning power, which clearly applies to the districting provisions in the Ordinance. The City is also mistaken in its argument that zoning is about substance and not procedure. Zoning Enabling Acts in nearly every state include similar, heightened procedural requirements beyond general home rule power. Chapter 211 sets forth numerous requirements for the procedures of enacting a zoning law, including proper notice;

hearings; creation of proper public bodies; right to judicial review; and others. *See* TEX. LOCAL GOV'T CODE §§211.006-.211.011. This is the key point about the City's interpretation of state Zoning Enabling Act: these heightened procedures (as compared with general home-rule regulatory authority) are a key part of the delegation of authority. The Legislature incorporated heightened procedural requirements in delegating the specific, and powerful, authority to regulate land by zoning district. It follows that the City must follow those procedures designated in Chapter 211 if it wants to create historic zoning districts.

Chapter 211 also requires procedurally that if a city wants to do zoning, it must do so "in accordance with a comprehensive plan." *See* TEX. LOCAL GOV'T CODE § 211.004. This is all the more reason why the Ordinance is illegal. As set forth in the Appellants' Brief, there are only two legal interpretations available. Either (1) the City does have a qualifying "comprehensive plan" under the loose standards of zoning jurisprudence, or, (2) as the City continues to argue, Houston *doesn't* have a qualifying comprehensive plan—which means that *zoning without planning is illegal*, and all the more reason that the historic district Ordinance violates state law. *See* Appellants' Brief at 45-50. The City's argument on this issue defies logic and law and should be discarded for good.

Finally, the City's argument on preemption is not relevant to this case. The City provides an extensive and well-written treatise on the theories of preemption,

but none of them apply here. First, this is not primarily a preemption case. Of course, the Appellants have never argued that state law somehow preempts local zoning. This goes to the basic misunderstanding that the City applies throughout its brief: that this is a conflict between general home-rule powers and a separate state law. It is not. The controversy is about the fact that *despite* the delegation of general home-rule powers in 1909, the Texas Legislature subsequently enacted a more specific delegation of the precise zoning powers. Chapter 211 clearly controls.

Time-honored canons of statutory construction provide that a specific law controls over a general one, and that a subsequently-enacted law should be presumed to have cognizance of the previous law. More importantly, the Texas laws at issue highlight these principles themselves. Article XI of the Texas Constitution—i.e., the Amendment delegating general home-rule power—specifically says that "no charter or any ordinance passed under said charter shall contain any provision inconsistent with the Constitution of the State, or of the general laws enacted by the Legislature of this State." TEX. CONST. art. XI § 5. The City makes a convoluted argument about preemption theory, but the textual interpretation is much simpler: Chapter 211 is certainly one of the "general laws" of Texas, and making an end-run around the substantive and procedural

requirements violates the text of the home-rule delegation itself. *See City of Laredo v. Laredo Merchants Assn*, 550 S.W.3d 586, 592 (Tex. 2018).

More importantly, Chapter 211 itself is a specific Enabling Statute that delegates municipal powers from the sovereign State in the first instance. Therefore, home rule powers don't come into play at all when the Legislature did not even delegate them until much later, in a more-specific act. Appellants do not even consider this to be primarily a preemption case, despite the City's extensive ruminations on the theory. As noted in the brief, it can and should be argued that the Ordinance is impliedly preempted because it was not enacted through the procedural requirements of Chapter 211. More important, though, is the determinative fact that Chapter 211 was a specific Zoning Enabling Act that specifically delegated the zoning power, meaning that the City's home-rule argument is without merit.

III. The City of Houston Prohibits Zoning in its Municipal Charter

The next section of this Reply argument is quite simple, because the City agrees: The People of Houston have rejected zoning, have established that rejection through a binding popular referendum, which is codified in the City Charter. Zoning is undisputedly illegal in the City of Houston. *See* Appellee's Brief x n.2. Therefore, if this Court determines that the historic districting

ordinance falls within the well-established definitions of zoning as set forth by the Texas Legislature, the City agrees that the Ordinance is automatically void. *See id.*

The Houston City Charter, as has been well-established in this litigation, prohibits zoning:

> The City of Houston shall have the power to adopt a zoning ordinance only by: (a) allowing a six month waiting period after publication of any proposed ordinance for public hearings and debate and (b) holding a binding referendum at a regularly scheduled election. Any existing zoning ordinance is hereby repealed. (Added by amendment January 15, 1994; amended November 6, 2012).

HOUSTON CITY CHARTER amend. VII-b § 13. A City Charter is akin to the local "constitution," in that it sets forth the fundamental rules by with the locality is governed. *See* BAKER, GILLETTE, & SCHLEICHER, LOCAL GOVERNMENT LAW 331 (5th ed. 2015). As such, a city government ordinance that violates the Charter is without authority and is void.

It has also been well-established that this Charter provision was enacted by popular referendum shortly after the most recent popular debate and election about whether Houston should adopt zoning. It must be presumed that the voters of Houston intended to stop the city government from regulating land by district, as "zoning" is clearly understood under the laws of Texas, generally-accepted definitions, and common sense. The City notes that the first version of the Ordinance was enacted in 1995 and there was no legal challenge; this is misleading, because the Amendments that required mandatory compliance for the

Appellants were not enacted until 2010, and this lawsuit was filed in 2012. Once this Ordinance went from general advisory guidance to a set of mandatory rules (along with the recent 200+ page extensive "Design Guidelines" (V R.R. Ex. 16)), Appellants considered the law to be zoning in violation of the Charter.

As a policy matter, historic preservation districts are a controversial topic in land use and local government planning and law and should be left to the decision made by the voters. Advocates of historic districts promote their value in preserving neighborhoods and sustainable use. *See, e.g.*, STEPHANIE MEEKS, THE PAST AND FUTURE CITY 79 (2016). Critics argue that historic districts infringe property rights, create gentrification and prevent access to affordable housing. *See, e.g.*, Kriston Capps, *Why Historic Preservation Districts Should be a Thing of the Past*, CITYLAB, www.citylab.com/equity/2016/01 (last visited Mar. 14, 2019). Of course, this Court should not be asked to decide this policy dispute, as it is an issue that should be subject to public debate. But the fact that the voters have explicitly rejected the policy of zoning means that as a prudential matter the City should not attempt to perform de facto zoning against the will of the People.

The City also argues that the process of enacting the historic districts is somehow "democratic." There are three problems with this argument. First, as noted above, the Appellants dispute the notion that the City properly rejected the repeal effort, which was not a finding of fact. Second, the City characterizes the

historic districts by analogy to deed restrictions or covenants. The glaring problem with this notion is that property covenants are entirely voluntary and contractual: *no one is ever forced to join covenants against their will*, as the historic district zones have done. Finally, the real "democracy" at issue here is quite obviously the referendum of the People—vigorously debated city-wide, voted on, and included in the City Charter—to reject zoning without an additional debate and referendum. The historic zoning ordinance makes an end-run around government by the people.

The City can't enact a zoning law by fiat just by avoiding the "z-word." The People of Houston have clearly rejected the concept of zoning as land-use rules drawn by prescribing rules based geographic districts drawn on the official map, as here. It is contrary to the will of the People and to basic principles of democratic governance for the City to engage in incremental de facto zoning. The City attempts to justify its unauthorized regulation by deliberately confusing the difference between historic *buildings* (clearly subject to regulation) and historic *districts* (clearly within the law of zoning); by incorrectly claiming broad powers contrary to the requirements of the Texas Zoning Enabling Act; and by ignoring the will of the People as expressed in the Houston City Charter.

CONCLUSION

For the reasons above, the Appellants, Kathleen Powell and Paul Luccia, respectfully request that the Court reverse the judgment of the trial court and order a declaratory judgment declaring the City of Houston's Historic Preservation Ordinance void due to its violation of the Houston City Charter and Chapter 211 of the Texas Local Government Code, and for such further relief to which Appellants are entitled.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the word-count limits of the Texas Rules of Appellate Procedure.

/s/ Matthew J. Festa
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CERTIFICATE OF SERVICE

I certify that on March 17, 2019, I sent a copy of this motion to the following counsel via e-file:

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